

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Cleopatria Martinez,	)	
	)	
Plaintiff,	)	CV-15-1759-PHX-NVW
	)	
vs.	)	Phoenix, Arizona
	)	January 15, 2016
Maricopa County Community	)	1:37 p.m.
College District, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

BEFORE: THE HONORABLE NEIL V. WAKE, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RULE 16 SCHEDULING CONFERENCE

Official Court Reporter:  
Linda Schroeder, RDR, CRR  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

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1 THE CLERK: This is civil case 2015-1759, Cleopatria  
2 Martinez versus Maricopa County Community College District,  
3 et al. This is the time set for a scheduling conference.  
4 Counsel, please announce for the record.

5 MR. SCHLEIER: Good afternoon, Your Honor. Tod  
6 Schleier and Kevin Koelbel for the plaintiff.

7 MR. UPPAL: Your Honor, good afternoon. Pavneet Singh  
8 Uppal of Fisher & Phillips on behalf of MCCD.

9 THE COURT: All right. Good afternoon, counsel.

10 Mr. Uppal, I haven't seen you in a long time.

11 MR. UPPAL: Yes, Your Honor.

12 THE COURT: I assume you're still making trouble,  
13 right?

14 MR. UPPAL: Not too much, Your Honor.

15 THE COURT: But that's what Mr. Schleier does. I  
16 would expect no less from you. So it's good to see you.

17 All right. The initial disclosures have been done,  
18 and no one contemplates any amended pleadings or additional  
19 parties, correct?

20 MR. SCHLEIER: That's correct, Your Honor.

21 MR. UPPAL: Yes, Your Honor.

22 THE COURT: So I'll just set February 12 as the  
23 deadline for any motions to amend pleadings. And as you know,  
24 under Rule 15, if circumstances justify, you can always file a  
25 motion. But you'll have to meet the increasing burdens showing

1 that it was timely and not prejudicial in an unfair way.

2 Mr. Schleier, are there any state law claims?

3 MR. SCHLEIER: No, Your Honor. Just the federal 1983  
4 claims.

5 THE COURT: I'm just not familiar with the community  
6 college district employment system. Do they have any state  
7 tenure rights or discipline rights that would give rise to any  
8 judicial review?

9 MR. SCHLEIER: The plaintiff was a tenure -- or was  
10 and is a tenured mathematics professor and has been, I believe,  
11 since 1985.

12 THE COURT: So there's no challenge that under state  
13 law, this action would have been within the authority -- is  
14 it the chancellor who does this?

15 MR. SCHLEIER: That's correct.

16 THE COURT: All right. All right. Let's talk -- I  
17 see the plaintiff has submitted -- you've submitted your  
18 written discovery requests. And I assume all of those  
19 documents will be exchanged very quickly. Let's talk about  
20 what other discovery is contemplated. So Mr. Schleier.

21 MR. SCHLEIER: Yes. We expect of course that the  
22 parties will be deposed. We anticipate that certain members  
23 within the mathematics department will also be deposed  
24 concerning the reinstitution of the directive that was issued  
25 in 2010. And we have, I believe, two experts who previously

1 testified at the hearing. And subpoenas have been issued to  
2 them for their files. And I anticipate they'll be --

3 THE COURT: Let me go back to that prior litigation.  
4 How would that prior litigation bear on this case?

5 MR. SCHLEIER: Well, I wouldn't use the word the  
6 litigation. There was a Hearing Committee --

7 THE COURT: Oh, I thought there was --

8 MR. SCHLEIER: No. I don't believe the prior  
9 litigation has anything to do with this. And ultimately at the  
10 appropriate time we'll file appropriate motions on that.

11 THE COURT: Well, the Hearing Committee issued written  
12 conclusions, correct?

13 MR. SCHLEIER: Findings of fact and conclusions of  
14 law.

15 THE COURT: Was there any other record made of their  
16 proceedings?

17 MR. SCHLEIER: Other than that and the trans -- the  
18 underlying transcript.

19 THE COURT: That's what I'm asking. Was there a  
20 transcript?

21 MR. SCHLEIER: Yes. There's about 300 pages.

22 THE COURT: So the entire record of what was before  
23 the Committee would be available, correct?

24 MR. SCHLEIER: It is.

25 THE COURT: Now, let's -- let me explore in more

1 detail the depositions you have in mind. Obviously -- Who  
2 would you want to depose from the defendant?

3 MR. SCHLEIER: I need to go back to my complaint, Your  
4 Honor, but certainly the --

5 THE COURT: And the reason I'm asking these questions,  
6 I want to have a sense of -- that we have an appropriate  
7 magnitude of discovery and from that judge how much time it  
8 should fairly take.

9 MR. SCHLEIER: Well, certainly the chancellor. It is  
10 conceivable that a member or two of the Committee who made  
11 their findings might be deposed, and I underscore might.  
12 President Solley who originally issued the directive may be  
13 deposed.

14 THE COURT: Which directive?

15 MR. SCHLEIER: The directive back in 2010 dealing with  
16 the copying and what Professor Martinez could and could not do  
17 as far as copying, use of materials.

18 THE COURT: Is there any dispute about what that  
19 directive was?

20 MR. SCHLEIER: No, no.

21 THE COURT: I'm not trying to quarrel with you. I'm  
22 just trying to understand why do you need to depose anybody  
23 about that if there's no dispute about what the directive was?

24 MR. SCHLEIER: Well, there may not be, but it's now in  
25 force and effect at this time. And we would probably want to

1 find the factual basis upon which that directive was issued.  
2 In other words, with whom did she consult, et cetera? And we  
3 may find that out from the expert when we get his file.

4 THE COURT: That sounds like information that would be  
5 very efficiently obtained through interrogatories. You might  
6 still want to follow up, but if it's just finding out basics,  
7 there's much cheaper ways to do it than depositions. I'm just  
8 thinking off the top of my head. So who else?

9 MR. SCHLEIER: I am looking for -- Could I consult  
10 with --

11 THE COURT: Certainly.

12 MR. SCHLEIER: We'll want to depose the interim  
13 president who reissued the directive in August, 2015.

14 THE COURT: That was after these events?

15 MR. SCHLEIER: Yes, after the suspension and once  
16 Professor Martinez began the fall semester last year.

17 THE COURT: What would you be looking to obtain from  
18 the --

19 MR. SCHLEIER: Just the reasons at this point, after  
20 the Hearing Committee had determined that the district had not  
21 satisfied its burden of proof of violation of copyright laws,  
22 why, again, was this directive then issued, issues like that.

23 THE COURT: Well, again, just reading the case report,  
24 it appears that Ms. Martinez was given an express directive,  
25 and then she continued to by doing offsite copying, doing

1 exactly what she had been told explicitly not to do. I'm  
2 wondering how it would matter whether, in terms of ultimate  
3 metaphysical truth, whether it was a copyright violation or not  
4 if in fact she had been told explicitly not to do it because  
5 the district had advice of counsel that it was a serious risk.

6 How would it matter what the truth is? Not truth. I  
7 don't mean truth. I mean the ultimate legal correctness of the  
8 fear of copyright violation. If she had been -- Seems like  
9 there's no issue of fairness or warning. She got all that.  
10 And she continued to do it.

11 So I'm just -- I'm very cautious about what I read in  
12 these reports. I don't assume anything to be true. But I'm  
13 just trying to think through what, you know, what's appropriate  
14 discovery.

15 MR. SCHLEIER: I mean, to summarize, I think from the  
16 plaintiff, there may be six, possibly eight depositions. I  
17 think certainly I would anticipate we would not exceed the ten  
18 deposition limit. That's my thought.

19 THE COURT: As you know, under the rules, I am charged  
20 with managing discovery to keep it proportionate to the  
21 dispute. And so there's no right to ten depositions. I just,  
22 by having this discussion, I just want to flesh out what's  
23 appropriate. And so -- all right -- eight to ten, but it's --  
24 What I'm hearing is that's not really focused yet. Those are  
25 just some initial thoughts.



1           So, Mr. Uppal, what do you have in mind for discovery,  
2 appropriate discovery?

3           MR. UPPAL: Your Honor, I think I know where you're  
4 going with this, and of course Mr. Schleier and Mr. Koelbel and  
5 I are all aware that the scope of discovery has to be  
6 proportionate to the dispute. But this is my second time at  
7 the rodeo with Professor Martinez. The prior litigation is not  
8 really only the committee hearing but her prior suit in 2011.

9           And I remember being in front of Judge Campbell in the  
10 prior suit which he dismissed with prejudice, and I find myself  
11 repeating the same thing; that in terms of proportionality,  
12 from my perspective as MCCD's counsel, the dispute is not just  
13 the employment issue that's before you right now. The dispute  
14 is that this individual has, according to our outside copyright  
15 expert, engaged in copyright violations. And she is under  
16 restrictions currently that she is chafing under that she wants  
17 lifted.

18           We have no trust in her that she will in fact comply  
19 with the copyright rules as they exist, as they apply to all  
20 entities, and we have been advised by our counsel -- the  
21 privilege on this is waived in terms of advice of counsel, the  
22 copyright counsel -- that the things that she is doing could  
23 expose, or has done in the past, could expose the district to  
24 monetary liability for copyright infringement that far exceeds  
25 anything in the employment realm.

1           So that's my perspective, that what's at issue here is  
2 not just the employment issue, but we cannot tolerate, unless  
3 she wins in court and is reduced to a judgment, a situation  
4 that would allow her to return to continue doing the things  
5 that she was doing before, putting the district at risk for a  
6 copyright infringement judgment against it.

7           THE COURT: Well, I thought from the case management  
8 report, this was just a money damage case for the past  
9 suspension. Is there more to it than that?

10          MR. SCHLEIER: Well, only to the extent that the  
11 ultimate finding by the Hearing Committee, whether that will be  
12 entitled to collateral estoppel effect. The Committee did  
13 determine that the district did not satisfy or meet its burden  
14 of proof of copyright violations after hearing both experts in  
15 that case.

16          MR. UPPAL: But that was --

17          THE COURT: How would that be collateral estoppel?  
18 That's just a committee within the district. That's not  
19 anywhere close to normal notions of collateral estoppel, which  
20 happen to be from a court adjudication, and sometimes it can  
21 arise from an administrative adjudication where there's  
22 sufficient legal basis to give that decision some degree of  
23 finality, although that's an exception, not the rule. This is  
24 just a committee in the district.

25          MR. SCHLEIER: Yes. But at least based upon some of

1 the legal research that I have done, both parties were given  
2 the opportunity to cross-examine. They were represented by  
3 counsel. There was no appeal of this that was possible. And I  
4 believe under at least some Ninth Circuit law that I have read,  
5 that can be given collateral estoppel effect.

6 MR. UPPAL: Your Honor, if I may speak to that?

7 THE COURT: You may.

8 MR. UPPAL: There is a collateral estoppel issue, just  
9 not the one that my opposing counsel is outlining.

10 The Hearing Committee is not collateral estoppel at  
11 all -- of course we'll brief all this -- because the  
12 standard -- the burden of proof is flipped on that. There is a  
13 collateral estoppel issue in that the issue of Ms. Martinez's  
14 copyright infringement were front and center in her prior  
15 federal court case. It was fully briefed.

16 THE COURT: I thought -- I'm sorry. I didn't go back  
17 and reread your complaint, but I read the case report. And I  
18 did not understand that from the case report. I thought the  
19 case -- The case report refers to prior litigation. But I  
20 didn't have any understanding that it had to do with these  
21 copyright issues. Tell me what it did.

22 MR. UPPAL: There was a prior case that was filed by  
23 Ms. Martinez in which she also alleged due process claims as  
24 well as discrimination claims. And one of the defenses that  
25 was front and center presented by myself, because I was the

1 defense counsel, MCCD explained to the Court in her prior  
2 federal litigation that the disciplinary measures that had been  
3 imposed were as a direct result of her copyright infringement.  
4 And an expert report was submitted and exchanged as a part of  
5 that prior litigation. When I say litigation, I'm not talking  
6 about the hearing. I'm talking about a federal court case.

7 THE COURT: That was Judge Bolton?

8 MR. UPPAL: I thought it was Judge Campbell, but I may  
9 be mistaken.

10 MR. SCHLEIER: It was Judge Campbell, I believe.

11 THE COURT: All right.

12 MR. UPPAL: So, Your Honor, the end result of that is  
13 after that issue being raised and focused and presented to the  
14 Court and an expert report being exchanged where the plaintiff  
15 did not submit a counter-report, she dismissed her case with  
16 prejudice. Since that issue was raised before Judge Campbell  
17 not as a collateral issue, as the core defense, the collateral  
18 estoppel is she can't raise it again. She can't contest it, at  
19 least in my view.

20 And as I think Your Honor is seeing now, this is going  
21 to be a somewhat more complicated case than just appears on the  
22 face of the pleadings.

23 THE COURT: So she dismissed it with prejudice?

24 MR. UPPAL: Yes, Your Honor.

25 So at some point -- we're not deep enough into this --

1 we will be, I anticipate, presenting a motion to the Court that  
2 with respect to the issue of actions that she may have engaged  
3 in with respect to copyright infringement, no matter what the  
4 Hearing Committee found, because that Committee has a different  
5 standard of proof, the fact that this was a core defense in the  
6 first litigation and she dismissed it without prejudice, she  
7 can't now contest it again before you.

8 Also, Your Honor's absolutely right. Irrespective of  
9 collateral estoppel, we don't actually have to prove copyright  
10 infringement in fact. What's at stake is the motivation. And  
11 we have advice of counsel, again, on a defense that we've put  
12 forward and waived the privilege on where the attorney has  
13 advised the district that what she has done in the past poses  
14 copyright infringement claims and subjects the district to very  
15 substantial potential liability.

16 That's the whole ball of wax essentially. That's why  
17 she has been subjected in large parts to the disciplinary  
18 measures that she is chafing under and contesting in this  
19 lawsuit.

20 THE COURT: You know, I also want to -- I don't think  
21 it's raised, but it says that she was requiring students to buy  
22 materials from her. And, boy, I'm not familiar with that. Is  
23 that an issue at all or --

24 MR. UPPAL: Your Honor, it is an issue in that there  
25 is a rule at MCCC, a published policy that says that

1 instructors cannot, without prior written approval, sell  
2 materials to their students. And the reason -- rationale for  
3 the rule is essentially that students may feel compelled to buy  
4 a particular instructor's textbook from which they are, you  
5 know, getting monetary remuneration, and that's just not  
6 permitted without written approval.

7 A, she violated the rule, but, B, she was instructed  
8 to issue refunds to everyone whom she sold those materials to,  
9 and years later she still hasn't done it. And as a result the  
10 Hearing Committee that attorney Schleier keeps referring to  
11 found that she had in fact committed willful insubordination.

12 THE COURT: So, Mr. Schleier, what -- I don't have the  
13 Committee's report, but what was their basis, stated basis for  
14 exonerating Ms. Martinez? That the district hadn't proven a  
15 case of --

16 MR. SCHLEIER: Had not met its burden of proof nor  
17 that she had violated the rules dealing with cash handling.  
18 And I believe there were two additional findings. And, yes,  
19 they did find that she was insubordinate by ignoring a  
20 directive concerning the reimbursement of students for copying  
21 charges.

22 I think it was \$11 --

23 THE COURT: What was the finding with respect to  
24 copyright violation? What did they find?

25 MR. SCHLEIER: That the district had not satisfied its

1       burden of proof concerning copyright violations.

2               THE COURT:   Proof of what?   Proof of what?

3               MR. SCHLEIER:   That in fact that she did, and it did  
4       not --

5               THE COURT:   That it was a copyright violation?

6               MR. SCHLEIER:   That they did not meet their burden of  
7       proof that she had violated the copyright laws or Fair Use  
8       Doctrine.

9               THE COURT:   So it's grounded in an ultimate judgment  
10       about copyright law?

11              MR. SCHLEIER:   Yes, it was, after hearing the two  
12       experts.

13              THE COURT:   And that was their reason for exonerating  
14       her?

15              MR. SCHLEIER:   That was the reason why they made their  
16       determination she should not be terminated, which was  
17       Chancellor Glasper's recommendation.

18              THE COURT:   Was there -- Again, I'm talking about the  
19       Committee's stated findings and recommendations.   Was there any  
20       other basis for exonerating her other than their conclusion  
21       that this was not a copyright violation?

22              MR. SCHLEIER:   Nor did she violate cash handling  
23       regulations of the district.

24              THE COURT:   What was the issue there?   I thought this  
25       was allegedly inappropriately requiring students to buy

1 materials from her. That doesn't sound like cash handling to  
2 me.

3 MR. SCHLEIER: No. It was basically reimbursing her  
4 for copying charges for lecture notes that she had distributed.  
5 That's what it was. We're not --

6 THE COURT: The students were required to reimburse  
7 her --

8 MR. SCHLEIER: For copying charges.

9 THE COURT: Well, I guess that will depend on what  
10 that regulation, how it reads, and I don't have that.

11 MR. SCHLEIER: And --

12 THE COURT: Go ahead.

13 MR. SCHLEIER: We're focusing so much on this  
14 copyright issue, but the true thrust of what we're arguing is  
15 denial of due process here when Professor Martinez was  
16 suspended for 15 months, which basically, at least in my 40  
17 years of practicing, that's virtually unheard of. And under  
18 Ninth Circuit law it's basically the same thing as a  
19 termination.

20 THE COURT: But I'm understanding the issue to be a  
21 process issue, a procedure issue.

22 MR. SCHLEIER: That's correct.

23 THE COURT: And what was the fatal defect in the  
24 procedure that was followed?

25 MR. SCHLEIER: That the Committee basically did not



1 recommend termination, that Committee findings should have been  
2 given to the Governing Board for final review. Chancellor  
3 Glasper decided he was not going to do that, and he then  
4 decided to suspend -- He issued new charges, which were  
5 basically almost identical to the old charges that were heard  
6 by the Hearing Committee. And then he basically suspended her  
7 for 15 months. And she did not get a pre- or a post-suspension  
8 hearing, which the Ninth Circuit has said is required.

9 THE COURT: I'm sorry. I didn't -- It was a new  
10 charge as opposed to going forward on the original charge?

11 MR. SCHLEIER: After the Hearing Committee in  
12 February, I believe it was, of 2014, Chancellor Glasper issued  
13 new charges, which were basically identical --

14 THE COURT: Were the old charges terminated?

15 MR. SCHLEIER: Well, the Hearing Committee heard them  
16 and made a decision on those old charges. And basically the  
17 recommendation of Chancellor Glasper was termination, and the  
18 Committee said no.

19 THE COURT: I know. But that recommendation of the  
20 Committee, that's not the end of the procedure, is it?

21 MR. SCHLEIER: Well, Chancellor Glasper was supposed  
22 to give that -- the findings of fact and conclusions of law to  
23 the Governing Board for ultimate review. He did not --

24 THE COURT: That's the Board, the District Board?

25 MR. SCHLEIER: The District Board, yes. And

1 ultimately decided to suspend her for 15 months.

2 THE COURT: I'm trying to get clear was there two  
3 separate sets of charges one after another, or was there one  
4 set of charges that continued through process?

5 MR. UPPAL: If I might attempt, Your Honor?

6 THE COURT: You may.

7 MR. UPPAL: So initially the set of charges were  
8 seeking the professor's termination. The Hearing Committee  
9 came back with a recommendation against termination. The  
10 chancellor has the option to adopt that recommendation or  
11 substitute his own.

12 What the chancellor did was upon receiving the Hearing  
13 Committee's recommendation against termination, he accepted  
14 that and instead recommended her suspension.

15 On that, contrary to Mr. Schleier's characterization,  
16 there was a pre-termination hearing with the vice chancellor of  
17 human resources. And in fact the professor and her attorney,  
18 her previous attorney, Stephen Montoya, presented her full case  
19 to the entire Governing Board contesting the suspension.

20 So what this case is really about is the plaintiff's  
21 attempt to elevate form over substance. They got all the  
22 process that was due, both pre-suspension and post-suspension.  
23 Their argument really boils down to a suspension for 14 months  
24 is the same thing as a termination, so the entire hearing  
25 process, including the Hearing Committee, should have been

1 reconstituted now to consider the suspension.

2 A, the internal due process rules don't require that,  
3 and, two, Supreme Court precedent doesn't require that.

4 Due process in this, both procedural and substantive,  
5 is informal. Supreme Court has repeatedly said that.

6 And she got a hearing on the suspension with the vice  
7 chancellor, and she got to plead her entire case before the  
8 Governing Board. And her attorney Stephen Montoya, as opposing  
9 counsel well knows, sent all the charges, all the  
10 recommendations, and everything to the Governing Board. She  
11 just couldn't win her case before the Governing Board. That's  
12 her main complaint.

13 THE COURT: Well, no one ever accuses Mr. Montoya of  
14 being less than diligent.

15 So, Mr. Schleier, I'm asking a question, not making an  
16 assertion. But it seems like if the chancellor had taken the  
17 original recommendation, say, I think otherwise, and I'm going  
18 to terminate her, it doesn't seem like there would be any due  
19 process violation there. She got her process, got a  
20 recommendation one way. The decision maker went the other way.

21 They could have done that, couldn't they?

22 In terms of federal due process --

23 MR. SCHLEIER: It would have had to have gone to the  
24 Governing Board. That would have been the last step in the  
25 process.

1 THE COURT: Is that right, Mr. Uppal?

2 MR. UPPAL: If the -- Yes. If the chancellor had  
3 taken the position that termination, permanent separation, was  
4 in fact what was called for, then he would have presented  
5 that -- his own recommendation of termination as well as the  
6 Hearing Committee's conclusions and findings of fact to the  
7 Governing Board. But what I'm saying to Your Honor is that  
8 happened anyway.

9 THE COURT: Well, what are -- what's the criteria for  
10 what matters have to be approved by the Board and what matters  
11 can be determined with finality by the chancellor? And I  
12 would -- I think I'm hearing you say that termination requires  
13 Board approval. Does everything require Board approval?

14 MR. UPPAL: No. No. A suspension does not require  
15 the approval of the Board, but in this case the suspension was  
16 approved by the Board.

17 THE COURT: All right.

18 MR. UPPAL: Because this exact argument that they're  
19 making here Mr. Montoya made in open session to the Governing  
20 Board saying, hey, this 14-month suspension is the same as a  
21 termination, you can't do this, or she's not -- you know, the  
22 circumstances don't warrant it. The Governing Board just  
23 didn't buy the argument.

24 THE COURT: All right. I'm having this extended  
25 discussion because I'm trying to get a handle on what's

1 appropriate discovery.

2 Frankly, this looks like a case that could be reduced  
3 to a stipulated statement of facts. It doesn't seem like  
4 there's any dispute about what actually happened. Have you all  
5 thought about that?

6 MR. SCHLEIER: We have not discussed that.

7 THE COURT: Let me throw it out. You can take eight  
8 depositions or you can sit down across the table and talk and  
9 find out what's really in dispute. And it would seem,  
10 Mr. Uppal, you can -- you've already given them all the  
11 records, correct, or you're going to?

12 MR. UPPAL: Yes, Your Honor.

13 THE COURT: Okay. So most of this is going to be  
14 readily ascertainable from the record. I'm just suggesting to  
15 you I'm not going to set any limits right now. I'm not  
16 disposed to it. But I'm suggesting to you that you all come at  
17 it that way because it looks like most of the dispute here is  
18 going to be legal points, not about what happened.

19 So, anyway, I was asking you, Mr. Uppal, what's your  
20 view on discovery?

21 MR. UPPAL: Your Honor, I will not be taking nearly as  
22 many depositions or I should say will not be initiating nearly  
23 as many depositions as plaintiff's counsel, but I have before  
24 me their initial disclosure that lists 43 witnesses and 5,600  
25 documents. This is not a criticism. It's initial disclosure.

1 I realize some of these are going to go by the wayside. But  
2 having been through this drill previously and knowing how  
3 strong the feelings are on both sides, I did talk with my  
4 colleague, Mr. Schleier, known him for many years, get along  
5 with him really well, and because of what's at stake, from my  
6 standpoint, as I previously explained, I would ask Your Honor  
7 to approve something close to the one-year discovery cutoff  
8 that we have requested, because I understand your point that  
9 there are -- that the legal issues may predominate or the  
10 factual issues. But I've been down this road with this  
11 plaintiff before, and I see what's coming in terms of  
12 experts --

13 THE COURT: What's coming?

14 MR. UPPAL: Your Honor, I think every single point on  
15 this case, if it tracks the previous case, which I think will  
16 be in fact what happens, is going to be disputed. I think that  
17 the legal issues will be informed by the facts. And I do see  
18 the other side taking the amount of depositions that they have  
19 outlined.

20 THE COURT: All right. Now, with respect to experts,  
21 you want to put on a copyright case? Is that what you want the  
22 experts for?

23 MR. SCHLEIER: It may be possible, yes. And that's  
24 why they have been identified and we put in the expert  
25 disclosure deadlines.

1           THE COURT: Is there any other expert testimony  
2 contemplated?

3           MR. SCHLEIER: I don't believe so. I don't believe we  
4 need an economic expert because the damages on the suspension  
5 are basically liquidated.

6           THE COURT: I would think so.

7           MR. SCHLEIER: Yeah. It's 15 months approximately.

8           THE COURT: Well, let me throw this out. Just reading  
9 this report and now having a better understanding, I want to  
10 raise the question of whether there's any room here for  
11 testimony about copyright law, first of all. It's a point of  
12 law. For better or worse, you're charged with what I think.  
13 We don't bring in expert witnesses to tell us what the law is.

14           And, secondly, perhaps more importantly, it's not at  
15 all clear to me that it matters what the answer is to the  
16 copyright issue. And if the advice of counsel is that there's  
17 a serious risk here and the district had a policy and a clear  
18 directive, it doesn't seem to me to matter whether -- how one  
19 would resolve the question of copyright law.

20           So if that's the case, it would seem that a lot of  
21 expense could be avoided. It wouldn't seem to make sense to  
22 spend all the time to work up experts and take their  
23 depositions if in the end it doesn't matter which expert it is,  
24 as I said, right, in terms of ultimate metaphysical truth.

25           So that's looking like one area that merits close

1 scrutiny as to whether it's worth the substantial expense that  
2 would be involved.

3 MR. UPPAL: Your Honor, I completely agree with that.  
4 I just want to explain why I'm going to have an expert. If  
5 this case survives summary judgment, if, I want the jury to  
6 understand why these disciplinary measures, which in a vacuum  
7 may seem harsh or the plaintiff will argue were unjustified or  
8 shouldn't continue -- they filed a dec action after all -- were  
9 not harsh, were entirely appropriate, and need to continue.

10 And the only way I can really do that is by presenting  
11 the testimony regarding the advice of counsel that we received  
12 as to which we've alleged an affirmative defense and waived the  
13 privilege. That's -- That's why I'm presenting it. I agree  
14 that at the end of the day, whether in point of fact she has  
15 committed copyright infringement is not the issue.

16 THE COURT: Well, all right. I think I'm not going to  
17 right at this time limit you on this. I urge you to sit down  
18 and see if you can focus your real areas of dispute, you know,  
19 right now. I'm skeptical that it would ever be submitted to  
20 the jury. You may get an instruction from me. But on the  
21 other hand I can understand why both sides don't want to be --  
22 find themselves in a situation where they might need that  
23 testimony if they don't have it.

24 And I guess if, Mr. Uppal, if what you're saying is  
25 you wanted to present this to show that there was a reasonable



1 good faith basis for the opinion of caution that came from your  
2 counsel, perhaps. And I'm not prejudging this, but I tell you  
3 having a trial on that would look like a big distraction to the  
4 jury from what really matters. This is our first discussion,  
5 so nobody has to get worried about anything I'm saying. But  
6 it's looking like that would be something that would have to  
7 be looked at closely, whether that would be a basic Rule 403  
8 issue, whether its probative value justifies -- whether it has  
9 any -- much or any probative value at all.

10 I suppose if we're going to have a trial that's going  
11 to leave it to the jury, I can see why both of you would want  
12 to have somebody lined up.

13 I'm just preliminarily skeptical that the trial would  
14 ever get to that, but -- All right.

15 Now, the time -- So you want nine months for fact  
16 discovery. And I agree if you're going to have expert  
17 testimony, that's not going to be really dependent on  
18 discovery. You can have your experts get going.

19 So, Mr. Uppal, you were saying you think you need that  
20 much time?

21 MR. UPPAL: Yes, Your Honor. I mean, again, I do know  
22 some of them are going to go by the wayside, but I'm already  
23 dealing with 43 identified witnesses and 5,600 document  
24 disclosure. That's only going to grow. And I would submit to  
25 you that given what's at stake, nine months of fact discovery

1 is appropriate.

2 THE COURT: Mr. Schleier, if you're listing 43  
3 witnesses, one way to speed this up and economize it is for me  
4 to require you to give the bare bones of what they're going to  
5 testify. And it seems highly likely that many of them are not  
6 going to have evidence that's either significant or disputed.

7 So that's the way for the other side to make a  
8 judgment of how many of them they might need to depose. And I  
9 often will require this, especially if you're offering  
10 witnesses that may well be background or cumulative witnesses.

11 MR. SCHLEIER: I understand that, Your Honor, but it's  
12 my practice in an initial disclosure statement to disclose  
13 everything and be overinclusive rather than paying the penalty  
14 later on of not identifying a witness.

15 THE COURT: That's fine. But I guess what I want to  
16 direct is that you all communicate. And right now I'm not  
17 going to make a directive. I'm going to rely on counsel's  
18 ability to be practical to let Mr. Uppal know what those  
19 witnesses are about, what they're going to say. And it may be  
20 undisputed matters. It may be cumulative. I just want an  
21 efficient, economic way for everybody to move the case along.

22 So I'm going to direct you to do that but not put it  
23 in an order. I'm sure you all know how to do that.

24 So November -- So, Mr. Uppal, what I'm hearing you say  
25 is there's a history of bad blood here without pointing fingers

1 at any one side or the other.

2 MR. UPPAL: I think that's fair, Your Honor.

3 THE COURT: Well, Mr. Schleier, you want -- you think  
4 this is an appropriate schedule too? I mean --

5 MR. SCHLEIER: Candidly, when I sent the initial draft  
6 to Mr. Uppal, the deadlines were shorter. He asked for  
7 somewhat longer deadlines, and as a matter of professional  
8 courtesy and based upon working with him for a long period of  
9 time, I extended them.

10 THE COURT: I often see that in the schedules that are  
11 proposed, and that's why I'm having this discussion.

12 What I worry about is if we have too much time, things  
13 stop and start, and counsel burn up more money refamiliarizing  
14 themselves with the case. On the other hand, I know there's  
15 other things to do. But if you're going to do depositions, it  
16 really makes sense to do them close, if not back to back on  
17 simple ones.

18 Mr. Schleier, you're going to be driving the  
19 depositions. Mr. Uppal doesn't have much to depose.

20 MR. SCHLEIER: Right.

21 THE COURT: So then it's just a matter of scheduling.  
22 I take it all these people are going to be people from the  
23 district?

24 MR. SCHLEIER: I would anticipate, Your Honor, yes.

25 THE COURT: So Mr. Uppal has good control over their

1 availability.

2 MR. UPPAL: With the exception of I think there are  
3 people that are retired. At least two of the people that he's  
4 mentioned have retired, including one that I definitely think  
5 he's going to depose, which is President Solley.

6 MR. SCHLEIER: That's right.

7 MR. UPPAL: And I believe Ms. Kakar, who is listed, is  
8 also retired. But I do not anticipate big problems.

9 THE COURT: All right. There's a lot to be said  
10 having discovery before you get deep into the summer because  
11 it's so hard to schedule stuff in the summer anyway. Could we  
12 get this done by the end of June; everybody enjoy their  
13 vacations afterwards?

14 Mr. Uppal, I'm not twisting your arm. I'm thinking  
15 economy for both clients, and if after you dialog you have  
16 legitimate disagreements with the other side about whether  
17 certain depositions are even necessary, you can bring that  
18 dispute to me, and I'll --

19 MR. SCHLEIER: Your Honor, could I offer a compromise?

20 THE COURT: Yes.

21 MR. SCHLEIER: I had originally suggested August 26th  
22 in my initial proposal, and that would basically almost split  
23 the baby between the end of June and when we have November 4th  
24 or so.

25 THE COURT: I'm not trying to beat up on you. I just

1 want to hear why that wouldn't be enough.

2 MR. UPPAL: August 26th, Your Honor?

3 THE COURT: Uh-hmm.

4 MR. UPPAL: Your Honor, I didn't move it out but two  
5 months, so Mr. Schleier's correct he proposed August 26th. I  
6 asked for a couple months, not like another half a year or  
7 anything, and he agreed.

8 THE COURT: But I guess the real issue, as I said,  
9 Mr. Schleier is going to be driving the discovery.

10 MR. UPPAL: Yes.

11 THE COURT: So you're going to be in a position to be  
12 initiating the process and the timeliness, and for the most  
13 part defendant will be producing these witnesses. So --

14 MR. UPPAL: Fair enough, Your Honor. And that will  
15 drive back -- that will necessarily have to drive back the  
16 expert disclosures as well. But so be it in terms of August  
17 26th if that's acceptable to the Court.

18 THE COURT: I don't want to put anybody in an unfair  
19 spot. I'm just trying to think through. Another goal is to  
20 have our motions for summary judgment briefed before the end of  
21 the year.

22 MR. SCHLEIER: The total briefing process or just  
23 filed, Your Honor? I'm sorry?

24 THE COURT: Just filed.

25 MR. SCHLEIER: I'm sorry?

1           THE COURT: Well, actually I know I'd have to think it  
2 through. If we have close of discovery at the end of August,  
3 we should be able to have the motions for summary judgment  
4 fully briefed before the holiday period in December. And  
5 nothing happens in the second half of December anyway.

6           MR. SCHLEIER: Or the first half.

7           THE COURT: And I don't schedule anything for anybody  
8 in the second half of December.

9           Indeed, when deadlines fall through there, I go  
10 through, and I just extend them on my own, playing Santa Claus,  
11 I guess.

12           Actually August 26th is a Friday. All right. Let's  
13 set the close of fact discovery for August 26th, and then  
14 expert disclosures -- Those experts can get going now.

15           MR. SCHLEIER: Your Honor, in my original proposal, it  
16 was May 20th.

17           THE COURT: September, October, November -- May --  
18 That should be plenty of time. That's four months. That's  
19 plenty of time.

20           And, Mr. Uppal, you're going to know whether they are  
21 going to be wanting to present an expert on the copyright  
22 stuff. So if it turns out they decide not to, you might decide  
23 not to, or you might independently want to do it. But you're  
24 going to know before that date whether they're doing that or  
25 not, so --

1           So let's set May -- Let's move it up a little bit,  
2           just -- Let's set May the 6th for initial expert disclosures  
3           for anybody that is intending to offer any experts other than  
4           rebuttal to the other side.

5           Let's say June -- June the 3rd -- Well, June the 10th  
6           is five weeks for any rebuttal -- initial rebuttal expert  
7           disclosures and June 24 for any, I mean, any responding expert  
8           disclosures, and June 24 for any purely rebuttal disclosures  
9           for whichever party is propounding initial experts. And then  
10          we'll also set August 26th for the close of expert discovery.

11          And, Mr. Uppal, how many weeks do you need to do your  
12          motion for summary judgment? I know the other side is too,  
13          but --

14          MR. UPPAL: 30 days after the close of discovery, Your  
15          Honor.

16          THE COURT: Well, how about September 23rd then? Does  
17          that work for both of you?

18          MR. SCHLEIER: That was the date I originally  
19          proposed, Your Honor.

20          THE COURT: Okay. All right. We'll set September  
21          23rd as the deadline for any dispositive motions. Then we'll  
22          brief them in due course, and it will be fully briefed before  
23          the holiday period.

24          And then in the event there are no dispositive  
25          motions, we'll set a date for submission of a proposed joint

1 final pretrial statement of September 16.

2 Now, I guess your proposal for the deadline for  
3 good faith settlement discussions, May 27, that seems to be  
4 plenty of time. As I think you all know, I require the parties  
5 and counsel to meet to discuss settlement. You don't have to  
6 settle a case. You don't even have to make a settlement offer.  
7 But you all have to be there and talk about it, and you have to  
8 file a one-line report with me telling me that you did.

9 I like to -- You can satisfy my requirement tomorrow  
10 if you want. I set a deadline by which it -- I require that it  
11 be done. I want this to be at the point in time where the  
12 parties have the important information but hopefully before the  
13 lawyers have spent all the money.

14 And for you, Mr. Uppal, you need a human being with  
15 settlement authority to be there.

16 MR. UPPAL: Understood, Your Honor.

17 THE COURT: Oh, I guess May 27th still looks fine.  
18 Anybody have any different thoughts?

19 We'll set May 27 as the deadline for the good faith  
20 settlement discussions. If you want to have a settlement  
21 conference with a magistrate judge, you both request it, I'll  
22 order that. Bear in mind it usually takes them six to eight  
23 weeks to get things scheduled. So if you want to do that, make  
24 the request enough ahead of time that the magistrate judge can  
25 get it on their calendar.



1 And, Nick, is there anything else on my list?

2 THE CLERK: The pretrial order deadline, you said  
3 September 16th, but I think you might have meant October. You  
4 said September 23rd for dispositive motions.

5 THE COURT: What was my date for summary judgment  
6 motions again?

7 THE CLERK: September 23rd.

8 THE COURT: Yes, indeed, it should be October. We'll  
9 set October 14 as the deadline for submission of a proposed  
10 joint final pretrial statement. But that date will drop out if  
11 any dispositive motions are set.

12 All right. Counsel, is there anything that either of  
13 you would like to bring up that would assist us in processing  
14 the case?

15 MR. SCHLEIER: I don't think so, Your Honor. Thank  
16 you.

17 MR. UPPAL: No. Thank you for your time, Your Honor.

18 THE COURT: Well, I encourage you to, as I said  
19 before, think through how you can process -- Obviously the  
20 plaintiffs have an interest. They're usually working on a  
21 contingent fee. They have an interest in being economical,  
22 thorough but economical, and the same incentive applies to the  
23 defendant. But it just seems to me like there are things here  
24 that you can narrow and notwithstanding the pessimism you  
25 express, Mr. Uppal. So hope springs eternal in my heart. All

1 right. Very well then. I'm going to take a brief recess to  
2 retrieve my file for the next case.

3 (Proceedings recessed at 2:29 p.m.)  
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C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 25th day of July, 2016.

s/Linda Schroeder  
Linda Schroeder, RDR, CRR